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IN THE

Supreme Court of the United States

October Term 1969
No. 421

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY and CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioners,

vs.

CITY OF SAINT PAUL, a municipal corporation,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eight Circuit

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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CITY OF SAINT PAUL, a municipal corporation,
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Respondent prays that the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit in the above entitled matter be denied, and respectfully show to the Court:

QUESTION PRESENTED

Whether a municipal zoning ordinance which effectively restricts the height of buildings on petitioners' property from rising above the ground level of a municipal park situated at the top of an adjacent bluff 40 to 90 feet above petitioners' property causing no interference with petitioners' existing land uses, is constitutional.

STATEMENT OF THE CASE

Petitioners (plaintiffs) commenced a declaratory judgment action May 20, 1966, asking that a proposed building height ordinance be adjudicated unconstitutional (R. 1). Subsequently, petitioners amended their declaratory judgment action on October 24, 1966, to enjoin the enforcement of the ordinance (enacted September 20, 1966); or in the alternative praying for money damages (R. 24). Petitioners claimed the rezoning was confiscatory, a taking of property without due process, and unconstitutional. Respondent (defendant), claimed the zoning ordinance was a proper exercise of police power and valid. The primary issue litigated was whether or not the amendatory zoning restriction was constitutional. The trial court entered judgment September 22, 1967, holding the ordinance was unreasonable, arbitrary, and, therefore, not a valid exercise of police power, and that it is unconstitutional as violative of due process of law (R. 382).

Respondent appealed from the trial court judgment enjoining the enforcement of the ordinance and adjudging the rezoning unconstitutional.

The United States Eighth Circuit Court of Appeals reversed the trial court judgment on May 6, 1969.

The disputed ordinance enacted September 20, 1966, by the Saint Paul City Council is an amendatory zoning ordinance in the form of a building height restriction (R. 28-39, Def. Ex. 0). The perimeter of the zoning restriction is defined by Kellogg Boulevard on the north, the Mississippi River on the south, St. Peter Street on the west, and Sibley Street on the east, which consist of approximately six city block (25 acres) (Def. Ex. O). The rezoned area includes a city park (4.7 acres) which extends more than three blocks along the edge of a sharp bluff overlooking the Mississippi River and valley. Petitioners' property lies from 40 to 90 feet below the surface of the park at the bottom of the bluff and is separated from the Mississippi River by railroad tracks and a waterfront street (Pl. Ex. 1, R. 48, 49). Respondents' property was used for warehousing, automobile parking, and railroad operations at the time the ordinance was enacted (R. 49, 51, 133, 134).

The ordinance imposes building height restrictions which effectively prohibit the height of buildings on petitioners' property above the level of the park or surface of the adjacent bluff (Def. Ex. 3, R. 58-62, Def. Ex. O, Pl. Ex. 3, R. 58).

The city park and petitioners' property are situated largely between the Wabasha Street and Robert Street bridges which cross the Mississippi River and serve as the gateways to the downtown area from the south (Pl. Ex. 1, R. 48). The park was established in 1930 and serves to open up the southern approach to the core area which lies immediately to the north of the park (R. 279, 303). It further serves as a passive recreational area for residents, shoppers, visitors and an estimated 23,000 to 25,000 downtown employees (R. 168, 303).

In the early 1960's, the St. Paul Housing and Redevelopment Authority undertook planning for the renewal and redevelopment of the downtown core area with the cooperation of other

public agencies and private interests (R. 299). The plan was formally adopted in 1964. A similar task was undertaken by the City Planning Department as part of an effort to develop a comprehensive plan for the entire city. The downtown portion of the comprehensive plan was adopted in March of 1963, and the plan as a whole in April, 1963 (R. 294). Both the renewal plan and the comprehensive plan evisioned that the park would remain and that no structures would be built on the rezoned property which would rise above the level of the park (R. 295, 300).

The area immediately north of the rezoned area has undergone the contemplated intensive redevelopment (Pl. Ex. 19, R. 162). The Hilton Hotel, Degree of Honor, Y.W.C.A. and Federal Courts buildings have been erected in the last few years.

At about the time that the public agencies began their planning, petitioners started a program of disposing of its non-operating property throughout its system (R. 116). The manager of the Real Estate Department of the railroad contacted a number of parties, beginning in the spring of 1961, in an effort to stimulate interest in the subject property (R. 117). He testified that publicity in the fall of 1963, regarding the possible imposition of height restrictions on the property, dampened the sales effort (R. 136). In late 1964, the railroads received an offer to purchase about one-half of the property, i.e., the land at the Wabasha Street end, for $4.00 per square foot (R. 118, 138). It was subject to the condition that the premises not be zoned so as to prohibit the construction of structures above the existing grade of the park (R. 120, 141). The management of the railroads rejected the offer on the basis that the property was needed for the railroads' operating purposes (R. 119). At least two other potential pur-

chasers of the property, who did not intend to build above the level of the park, indicated an interest but made no firm offers (R. 120, 143).

A consulting firm was engaged by the railroads in February of 1966, two months prior to trial, with a view toward a determination of the highest and best use of the property (R. 109, 143). Petitioners only interest was to sell the property (R. 143, 378). The study indicated that the highest and best use would be to construct a motel and four high rise apartments which would rise from ten to twenty-two stories above the park (R. 181). This use would give the apartment occupants the benefit of the light and view over the river valley but, in so doing, would equally deprive others of these benefits (R. 258, 300). It would also result in the closing off the "front door" of the core area from the southern approaches (R. 295, 301). The study evisioned building on the property originally deemed necessary for operating purposes (R. 166).

A number of municipal authorities and boards, including the Housing and Redevelopment Authority, the Planning Boards, and the Zoning Board recommended the imposition of height restrictions (R. 297, 300). The action of the Planning Board was taken after a public hearing. The resolution passed by that Board recited that the rezoning was reasonably related to existing land uses, the overall needs of the community and the planning for future land use (R. 297).

On September 3, 1964, the City Council, after a public hearing, unanimously approved an ordinance restricting the height in the questioned area and directed the corporation counsel to draft such an ordinance (R. 122). The City Council formally adopted the ordinance on September 20, 1966 (R. 39).

The District Court found that the fair value of the property prior to the passage of the ordinance was $320,000, and that its after value was $150,000 (R. 380).

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED

1. The Court of Appeals Has Not Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court.

Petitioners recited *United States v. Causby*, 328 U.S. 256, 90 L. Ed. 2d 1206, 66 S. Ct. 1062 (1946); *Griggs v. County of Allegheny*, 369 U.S. 84, 7 L. Ed. 2d 585, 82 S. Ct. 531 (1962); *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 13 L. Ed. 2d 439, 85 S. Ct. 493 (1965); *Village of Euclid v. Ambler*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183, 72 L. Ed. 842, 48 S. Ct. 447 (1928); in support of their contention that the Court of Appeals' decision conflicts with applicable decisions of this Court.

Respondent contends *United States v. Causby*, supra, is markedly distinguishable from our instant case. In the *Causby* case, there is evidence of a substantial physical invasion and *actual use* of the airspace almost immediately above the landowner's property. The flight path of low flying aircraft not only occupied and used the airspace some 67 feet above the landowner's house, but caused startling noises, deprived the occupants of sleep, and forced the owner to give up his chicken business. In the case at bar, respondent has merely imposed a zoning restriction on petitioners' property. There is no physical taking or appropriation of property, nor does the zoning restriction result in any destruction or interference with any of the *existing* land uses employed on petitioners' property at the time the restriction was enacted.

Griggs v. County of Allegheny, supra, presents a similar situation wherein low flying aircraft over the landowner's

residence resulted in the occupants wearing ear plugs, taking pills, inability to sleep, and health impairment. Consequently, the landowner's actual use of the property as a residence was rendered impractical, if not unusable. Hence, the *Griggs* case is similarly distinguishable as discussed above.

Jankovich v. Indiana Toll Road Commission, supra, does not constitute a direct conflict with the Court of Appeals' decision upholding the restriction. In the *Jankovich* case, this Court dismissed the writ of certiorari as improvidently granted, but indicated (379 U.S. at 496, n. 3):

> "* * * Needless to say, we express no opinion in this case regarding the validity under the United States Constitution of the city's airport zoning ordinance."

The zoning case at bar is distinguishable from the *Jankovich* case in that the disputed building height ordinance merely imposes a restriction on the use and employment of petitioners' property causing no interference with existing land uses, whereas the Indiana Court held the city of Gary attempted to take and appropriate to its own use the ordinarily usable airspace of property adjacent to the Gary Airport.

Petitioners further claim the majority opinion which upheld the disputed zoning restriction on a concept of reasonableness is contrary to the constitutional test prescribed by this Court and is a complete deviation from all previously accepted law. Respondent contends that such claim is erroneous. This Court in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962), stated (369 U.S. at 594):

> "The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria."

See also, *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 61 L. Ed. 472, 37 S. Ct. 190. In accord: The Minnesota Supreme Court in *Naegele Outdoor Adv. Co. v. Village of Minnetonka*, 281 Minn. 482, 162 N.W. 2d 206, states (162 N.W. 2d at 212):

> "Whichever of these views is accepted, however, the test governing our decision on the constitutional issue presented is whether the village council in exercising its legislative prerogative acted reasonably, *with the question of reasonableness* to be resolved by deciding whether its determination upon a consideration of the facts was based on reason and logic and not on whim or caprice, and that it promotes a legitimate police-power objective. * * *" (Emphasis supplied.)

2. The Court of Appeals Has Not Decided an Important State Question in a Way in Conflict With Applicable State Law.

A close reading of *Alexander v. City of Minneapolis*, 267 Minn. 155, 125 N.W. 2d 583 (1963), reveals a significant factual difference. In the *Alexander* case the landowner purchased land with the express purpose of erecting a six-story apartment building and the city of Minneapolis effected an illegal hold order condemned by the Minnesota Court, which had the effect of freezing the issuance of any building permits for nine years until a subsequent comprehensive zoning ordinance was enacted limiting building heights to two and one-half stories. There is no evidence in the record that petitioners acquired the property with the expectation that it would be used for high rise buildings, but rather expressed a sole interest in selling the property.

Petitioners also cite *Burger v. City of St. Paul*, 241 Minn. 285, 64 N.W. 2d 78 (1954); *Olsen v. City of Minneapolis*, 263 Minn. 1, 115 N.W. 2d 734 (1962); *Pearce v. Village of Edina*, 263 Minn. 553, 118 N.W. 2d 659 (1962); *Golden v. City of St. Louis Park*, 266 Minn. 46, 122 N.W. 2d 570 (1963); and *Ostrand v. Village of North St. Paul*, 275 Minn. 440, 147 N.W. 2d 571 (1966); in support of their contention.

While respondent agrees with the holding in the *Burger v. St. Paul* case, supra, it has little, if any, direct application to the case at bar. The *Olsen*, *Golden*, and *Ostrand* cases, supra, turned on arbitrary refusals to issue permits wherein the respective property owners had complied with zoning code requirements and no valid basis existed to refuse the requested permits. In the *Pearce* case, supra, there was evidence that the disputed zoning reclassification was designed to restrict competition. Hence, petitioners reliance on these cases is misplaced.

Petitioners apparently rely on the dicta in each opinion that an amendatory zoning ordinance designed to protect aesthetic values and resulting in the diminution of the market values of the complainants' property is invalid. However, the Minnesota Court has altered its application of this *old* rule in *Naegele Outdoor Adv. Co. v. Village of Minnetonka*, 281 Minn. 429, 162 N.W. 2d 206, wherein the Court states (162 N.W. 2d at 211):

> "Plaintiff, however, relying upon dicta in several recent Minnesota cases which reiterate an old rule (Court cites in footnote: Pearce v. Village of Edina, 263 Minn. 553, 118 N.W. 2d 659; Olsen v. City of Minneapolis, 263 Minn. 1, 115 N.W. 2d 734), argues that a zoning ordinance based primarily on aesthetic considerations cannot reasonably be said to promote the general welfare. Since the council's conclusion that the ordinance promotes the general wel-

> fare is admittedly the only constitutional basis for enacting it, plaintiff argues that it is unconstitutional."

The Court goes on to discuss aesthetic considerations and subsequently states (162 N.W. 2d at 212):

> "The mere fact that the adoption of a zoning ordinance reflects a desire to achieve aesthetic ends should not invalidate an otherwise valid ordinance. Thus, if the challenged restriction is reasonably related to promoting the general welfare of the community or any other legitimate police-power objective, the fact that aesthetic considerations were a *significant* factor in motivating its adoption cannot justify holding it unconstituional. Oscar P. Gustafson Co. v. City of Minneapolis, 231 Minn. 271, 42 N.W. 2d 809; State ex rel. Beery v. Houghton, supra." (Emphasis supplied.)

Petitioners claim that the Court of Appeals refused to apply Minnesota law and that a standard based on reasonableness is in disregard of established pronouncements of this Court laid down in *Erie v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938). The Court of Appeals' decision does not conflict with Minnesota law as discussed above.

Notwithstanding the Court of Appeals has considered and rendered a decision not in conflict with Minnesota law, jurisdiction has been invoked on the basis of a federal constitutional question in addition to diversity of citizenship (R. 2, 376). When a federal question is involved, the citizenship of the parties is immaterial. *Duignan v. United States*, 274 U.S. 195, 71 L. Ed. 996, 47 S. Ct. 566 (1927) and *Nichols v. Alker*, 231 F. 2d 68 (1956). In view of the existence of a federal question—whether the ordinance is unreasonable in violation of the 14th Amendment to the United States Constitution, there

is no compelling authority which would preclude this Court from applying federal constitutional law. *Tower Realty v. City of East Detroit*, 185 F. 2d 590, (1960, 6 Cir.); *San Francisco S. News Co. v. City of So. San Francisco*, 69 F. 2d 879 (1934, 9 Cir.) and *Baird v. Koerner*, 279 F. 2d 623 (1960, 9 Cir.).

3. The Court of Appeals Has Not Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

The findings recited by petitioners that the ordinance:

> "(a) bore no substantial relationship to health, safety, morals or the general welfare;
>
> "(b) was an instance of spot zoning and not part of a comprehensive plan; and
>
> "(c) was a confiscation without compensation in that the benefit to the public was small in comparison to the detriment of the property owner;"

generally are considered to be conclusions of law. Trial court findings which constitute conclusions of law do not preclude an Appellate Court from making an independent determination as to legal conclusions and inferences drawn therefrom. *U. S. v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526, 5 L. Ed. 2d 268, 81 S. Ct. 294 (1961). Even if the conclusions petitioners allude to amounted to mixed conclusions of law and fact, the matter is reviewable free from the clearly erroneous rule. *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491, 57 S. Ct. 569, 81 L. Ed. 755 (1936); *Ashland Oil & Refining Co. v. Kenny Construction Co.*, 395 F. 2d 683, 684, (6 Cir. 1968); *Official Creditors' Committee of Fox Markets, Inc. v. Ely*, 337 F. 2d 461, 467, (9 Cir. 1964).

The Court of Appeals indicated, however, in its review of the trial court's determination of invalidity, it examined the record not to see whether its findings are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis. *South Carolina State H. Dept. v. Barnell Bros.*, 303 U.S. 177, 191-2 (1938); *Weinberg v. Northern Pac. Ry. Co.*, 150 F. 2d 645, 648 (8 Cir. 1945); *Steinbrugge v. Haddock*, 281 F. 2d 871, 872 (10 Cir. 1960).

4. No Special and Important Reasons Exist Which Would Require a Review on Writ of Certiorari.

Although there is no dispute that a federal question is present-whether, when so applied, the ordinance is arbitrary and unreasonable in violation of the 14th Amendment to the Constitution-Respondent contends no special and important reasons are present in view of previous pronouncements and dispositions of this court relating to regulatory ordinances would require a review on writ of certiorari in the instant case. *Welsh v. Swasey*, 214 U.S. 91, 53 L. Ed. 923, 29 S. Ct. 567; *Hadacheck v. Sebastain*, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed 303; *Standard Oil v. Tallahasse*, 183 F. 2d 410 (5 Cir. 1950), cert. denied, 340 U.S. 892, 95 L. Ed. 603, 71 S. Ct. 51 (1950); *McMahon v. City of Dubuque*, 255 F. 2d 154 (1958), cert. denied, 358 U.S. 833, 3 L. Ed. 2d 70, 79 S. Ct. 53 (1958); *State v. Wieland*, 69 Wis. 262, 69 N.W. 2d 217, cert. denied, 350 U.S. 841, 100 L. Ed. 750, 76 S. Ct. 81 (1955); *Stover v. New York*, 1 N.Y. 2d 462, 240 N.Y.S. 2d 734, 191 N.E. 2d 272, cert. denied, 375 U.S. 42, 11 L. Ed. 2d 107, 84 S. Ct. 147 (1963).

CONCLUSION

WHEREFORE, Respondent respectfully prays that the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit be denied.

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